Supreme Court, U.S.
FILED
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No

In The
Supreme Court of the United States

Victoria Talyansky,
Petitioner,

v.

Xerox and J. M. Ishler as
Division Manager,
Respondents.

On Petition For Writ Of Certiorari
To The United States Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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42pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether unlimited employment discrimination was a result of Xerox's policy to support manager actions.

2. Whether three year statute of limitation should be applied in the cases of willful and deliberate employment discrimination under Title VII: sexual harassment, wrongful termination and etc...

3. Whether discovered false and abusive statement about termination from Xerox could be interpreted in a different way then a direct evidence to apply Equitable Tolling and to prove post-retaliation and blacklisting.

4. Whether the Second Circuit erred when found my actions were not diligent to apply equitable tolling.

5. Whether the District Court erred in finding no facts supporting my claim in view of all facts and aspects brought for consideration.

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JURISDICTION

On September, 30 1998, the Honorable David G. Larimer of the United States District Court for the Western District Court of New York entered and endorsed an Order which dismissed my complaint in its entirety. Thereafter, this matter was timely brought before the Second Circuit Court of Appeals and was subjected to its briefing schedule. After considering the briefs and hearing oral argument on the matter of my employment discrimination complaint in all its aspects under Title VII, the Second Circuit issued its opinion improperly upholding the decision of Judge Larimer.

That order was filed on June, 29 1999 arising an issue of the rights and time limits for individual to file a complaint under Title VII in the district court and supporting erroneous decision rejecting proof for Equitable Tolling.

STATEMENT OF THE CASE

On September, 8 1997, I am Victoria Talyansky, Pro Se filed a civil case against defendants Xerox Corporation ("Xerox") and J. M. Ishler ("Ishler") under Title VII of the Civil Rights Act, 42 U. S.C. 2000 ("Title VII") in the United States District Court Western Division of New York. The complaint claimed hostile work environment, sexual harassment, retaliation and wrongful discharge as a direct response to a written complaint, post-retaliation and blacklisting after discharge to nullify any possibility to find a job.
The defendants filed the Motion to Dismiss the Complaint in its entirety on October, 1 1997. My response in Support of the Charge was filed on October, 30 1997.
The Motion was pending in the U.S. District Court, Western District of New York until "Order to Show Cause in writing" was issued in August, 1998. My response was filed on August, 18, 1998. Decision and Order was filed on September, 30 1998 and endorsed by Honorable Chief Judge David G. Larimer with conclusion to grant the defendants' motion to dismiss the complaint in its entirety.
The order was filed with prejudice (A5-A10) and the Judgement was filed on October, 2 1998. (A11)
The decision gives me no option to decide whether I had to file charge with EEOC even if this organization did not want to help me, or try to find another job to be able to have a normal life without extreme distress. The time limits issue was the main problem as well as discovered false and abusive statement describing the reason for discharge was not accepted as a proof for Equitable Tolling. In addition, statements about sexual harassment, written complaint and discharge after complaint on the very next day with an endless retaliation for years as a result of false and abusive reason for termination was determined too vague and

generalized to consider my claim serious enough to allow me to have a fair trial in the district court. Notice of Appeal was filed timely in the Second Circuit of United States Court of Appeals on October, 14 1998. This appeal was docketed on October, 27 1998. After filing briefs and oral argument, the Second Circuit issued a Summary Order on June, 29 1999 (A1-A5) affirming the decision of the district court.
The Second Circuit concluded all facts do not toll the time limits because my actions erroneously were not determined diligent. The phrase from the Order "Talyansky is also not entitled to equitable tolling merely because she is an immigrant and unskilled in the law" sounds offensive because it excludes me as an immigrant to obtain my rights as American to have a fair trial. I simply could not be legally prepared as an immigrant to this EXTREME and MULTICOLORED level of discrimination.

STATEMENTS OF THE FACTS

I was working for Xerox as a contract software tester-operator for 3 years and 10 months. Before the management reorganization, I never had any communication or job related problems.

1. Hostile work environment:

After the management reorganization, the environment in the Lab had changed overnight. At that time, I did not know there were known methods of hostile environment. I was shown some signs of this type of treatment just a few days after Ishler became a division manager. Despite my excellent job performance and willing to work hard, I was unable to work effectively. Tests I performed before, were removed from me. Every day I could be transferred to another test engineer or to another system and was shown no respect (just opposite) for the job I was performing and was experienced in. Ishler was very creative in this type of management. I tried to ignore this new practice and continued to work hard. The new manager's main goal was FAVORITISM NOT A JOB PERFORMANCE.

The extremity was a scandal with a fistfight between two young women in December, 1993. (one of them was treated favorably by Ishler). It appeared to be a pattern for a new management and I appeared to be selected the next one for a hostile working environment. Some co-workers who had less experience or less education were promoted or had chance to be transferred to another departments.

I was sure my experience and qualifications would allow me to have the same rights as other people had. I asked Ishler a few times to transfer me to another department or even to another building under his management. I told him I could not work effectively. His response was I had no chance.

I did not get any explanation why I was given this type of treatment. I understood it later. I tried to escape this hostile type of management. At that time, I thought he had some sexual problems, but later I decided Ishler's problems might be related not just to sex, but to national origin (anti-Semitic). He tried to isolate me from co-workers I always had good relations with. Finally, I was sexually harassed and terminated for my willing to avoid problems Ishler tried to create around me.

Because working conditions became intolerable, I started searching vigorously another place to work. I tried to look for a job outside Xerox as well as inside one. I asked a few managers from another departments to help me to find another job. They knew me as a highly skilled specialist and tried to help me. But all my efforts were fruitless. Finally, I asked my agency Burns Personnel to find me another job. They indicated they would be able to help me after the end of contract with Xerox in the end of 1994.

I hoped for a peaceful solution.

2. Sexual Harassment and Wrongful Termination as a Result of Complain about Harassment:

I was sexually harassed by the woman Faith Kune who was hired a few months before that incident occurred. Something happened and her behavior became inappropriate. She became rude and tried to provoke me to a scandal. As a culmination was sexual harassment on September, 26 1994 when she named me a "bitch" and "Mrs. Bitch" in the morning. It was her response to "Good Morning" and a request not to use a phone for a few minutes because I was waiting for a return call.

I did not answer her, but decided to complain. My verbal complain to Ishler had a reversed effect. Her behavior became more excited with an obvious support from the management.

I felt humiliated. I had to continue working with her in the same bay. Test engineers showed her support and suddenly the bay we were working in turned to a funny theatre where everybody was having a break and a good time. Ishler did nothing to avoid further problems. I decided to write a complaint (A16). But it appeared, Ishler did not want to have the most.

He could not control himself and my contract was terminated on the next day after submitting that complaint.

Of course, I was upset and confused. I tried to get help from EEOC and Human Rights organizations. Unfortunately, I did not get one. Either my English was not too good or my employer Xerox sounded too powerful to take care of one immigrant, or I did not sound self-confident, but I did not get any response. I tried a few times. Every time I had to explain the same facts to a different people without any advice what I had to do. They promised to call me. Nobody ever called me back. It was a real pain. I decided to go ahead and forget what I went through. I was hopeful on agency's promise to help me to find a job and my excellent reference letters from Xerox (A17-20). Actually, my wish was to get rid of that "strange" manager, but peacefully.

4. Post-Retaliation and Blacklisting.

I think, the word "peacefully" was not in Ishler's mind.

After Xerox's termination I was able to find three jobs.

- I was working at Mercury Print for 6 weeks (Nov.-Dec. 1994). This company had orders and equipment from Xerox. I started working at Mercury and replaced a young woman who replaced me at Xerox in the same Ishler's department. After 6 weeks, I was told the company was closing the second shift because of lack of work.

As I found out in 1997 (A 15), they terminated me giving a false and damaging information about termination. But later I discovered the company replaced me with a young man on the very next day they terminated me. This man used to work with me in the same department at Xerox. (Sex/Age Discrimination - 2-nd Cir, 98-9438, cert. den.).

- I was working at Millennium for 6 days (March, 1995) (2-nd Cir., 98-9607, cert. den.). The company offered me a strange contract I could not get copy of after termination. They indicated they would hire me after four-day test. After four days the manager really made me a verbal offer, but something happened overnight and he indicated the company unexpectedly lost all its funds to hire me with salary $11 per hour. Was that termination a result of Xerox's blacklisting or they just received and promptly used Xerox's damaging information to be able to hire another person and lied me without any risk to be caught? I am tired to think about.
- I was working at Syracuse Language Systems for 4 months (August-December, 1995) (Age Discrimination/Hostile Work Environment - 2-nd. Cir., 98-9238, pending). At Syracuse Language System, I was a subject not just to Age Discrimination, but to an outrageous humiliation and hostile work environment. The fact the company was involved in business with Xerox too makes me very suspicious about ways Syracuse Language treated me.

After termination from Syracuse Language System I was unable to find another job at all: temporary or part time, professional or not professional. I am sure that the fact it was more than 300 days after termination from Xerox made my search for a job fruitless. This fact and my incompetence were completely on the side of Xerox.

During my interview at Picture-Tel in the beginning of September 1996 I was offered no job and no reimbursement for two days interview. I lost around $400.

This was the last drop. I decided to take another approach to fight for myself: to study the anti-discrimination employment law. I was inexperienced in employment discrimination issues. I could understand manager's anger, but could not imagine his ability to destroy individual's life, not just career and it could be so easy to fulfil.

After I lost any hope to find a job, I requested my former agency Burns Personnel to give me the official statements about reasons of terminations from two companies: Xerox and Mercury Print I had contract with. What a shock it was when I received OFFICIAL REPORT, not rumors indicating that two companies give an absolutely false statements about termination of contracts that obviously damaged and in fact nullified my search for other job.

LEGAL ARGUMENT

1. WHETHER UNLIMITED EMPLOYMENT DISCRIMINATION WAS A RESULT OF XEROX'S POLICY TO SUPPORT MANAGER ACTIONS.

I am sure if Xerox really provided anti-discrimination policy they have on the paper without any doubt and Ishler knew he would be punished for employment discrimination, it would never be extended to this destructive level.

1: My case proves full manager liability for creating hostile intolerable environment around me, for treating me unequally, for giving me no opportunity to work efficiently.
Ishler used his power to create work environment where actual job performance meant nothing.
He used his power to create environment where favoritism was the main issue and people who either did not understand that rules or simply did not want to follow them as not related to job issues appeared to be in hostile work environment.
Ishler refused to give me even a primitive opportunity to work in another department or another building as he gave it to many people in the department.
2: My case proves manager liability for giving full support to a person who sexually harassed me. I can't exclude possibility of Ishler's involvement in organizing this harassment because Faith Kune continued to work under Ishler's management. Her contract wasn't terminated as mine and she wasn't even condemned for her actions.
3: My case proves manager liability for wrongful termination as a result of retaliation for complain. Ishler terminated me maliciously because he knew he would get full Xerox's support in any situation.

4: My case proves manager liability for damaging my employment reputation by giving a false reason for termination to a prospective employer. I was blacklisted by this monster who enjoyed for years blocking me from finding a job and causing an emotional distress. This is clearly an abuse of power.

The Robinson decision allows a former employee to claim that any subsequent negative evaluation is retaliation. (A 15). *(Robinson v. Shell Oil Co., No. 95-1376, Febr.,18 1997).* *How long does this protection last for a former employee? For as long a period as would permit the factual conclusion that the employer's negative job reference was made in retaliation for the former employee's participation in a Title VII case.*

2. WHETHER THREE YEAR STATUTE OF LIMITATION SHOULD BE APPLIED IN THE CASES OF WILLFUL AND DELIBERATE EMPLOYMENT DISCRIMINATION UNDER TITLE VII: SEXUAL HARASSMENT, WRONGFUL TERMINATION AND ETC...

I think my case is a clear situation when willfulness in employment discrimination under Title VII has the same or even greater impact on employee-victim of discrimination. Discussion of standards for the word "willful" in *McLAUGHLIN v. RICHLAND SHOE CO.,Supra (1988)* supports my point to extent "willfulness" to all type of employment discrimination under Title VII.

I think there is no difference whether employer willfully violates ADEA or Title VII. My claims of sexual harassment and retaliation for complain, wrongful termination and endless post-retaliation and blacklisting indicate they all were under willful and deliberate statute.

Ishler's actions and Xerox's support of his actions could not be evaluated in a different way. The fact the company can not offer any explanation to the circumstances occurred in the department proves total willfulness in manager's actions.
I think 180 or 300 days statute of limitations applies in the situation when and if EEOC is willing to mediate between employee and employer.
But in the situation when EEOC has no interest to mediate (as it happened in my situation) or employee did not decide yet if he is willing to make his life and life of his family hellish by filing the charge with EEOC after discrimination occurred, employee should have the right to avoid stressful, self-destructive and often useless fight with a powerful employer.
As supportive argument for this statement I would like to repeat Hon. Larimer *"Of course, the timely filing of an EEOC charge is NOT a jurisdictional prerequisite to filing a federal lawsuit "(Decision and Order, A 8).* Yes, I was willing to avoid many problems after Xerox's discharge.
I had many reasons to do so.

First of all, I am an immigrant and was not legally educated and prepared to defend myself even after being discriminated and wrongfully discharged. I think the Second Circuit erred when stated there is no excuse for not knowing the law for immigrant. Actual result of this statement, unfortunately, defends Xerox's actions.
My point is: I did not know the LAW, but Xerox and Ishler knew what is legal and what is not; they knew I was legally incompetent. This knowledge actually inspired them to break the law, to ignore the law. They were acting as UNA-BOMBER using a very safe "weapon" - job reference!!! It happens because OF TIME LIMIT ISSUE! They abused their immeasurable power as employer and knew nothing would stop them.

As an example how company can treat their employee and how destructive it can be for some of them.

a)WALTERS v. METROPOLITAN EDUCATIONAL ENTERPRISES, INC., et al. certiorari to the united states court of appeals for the seventh circuit No. 95-259.

In 1990, petitioner Walters was fired by respondent Metropolitan Educational Enterprises, Inc., soon after she filed an employment discrimination charge against it under Title VII of the Civil Rights Act of 1964

b) LESLIE A. ROSS, v. SAINT AUGUSTINE'S COLLEGE, 4-th Cir.No 95-1949): After Leslie A. Ross testified against St. Augustine's College in a successful reverse discrimination case by one of its professors, her fortunes as a student at the college changed dramatically.

Secondly, EEOC (Buffalo division) actually misled me refusing to help. I think that EEOC should mail information to everybody who called them asking for help, particularly if this person is an immigrant and sounds legally inexperienced.

Thirdly, not every employer is willing to retaliate and actually has ability to do so, not every company would support its manager in endless discrimination against employee or former employee.

I did not know Xerox supported Ishler in his willing and ability to create discriminative employment conditions and organizing endless retaliation and blacklisting.

If I was able to find a job, I would NEVER file any charge despite numerous examples of discrimination. I was struggling to find a job and the result was three more charges. I am sure TIME LIMITS ISSUE inspires many employers to feel free in READINESS TO DISCRIMINATE and RETALIATE.

If TIME LIMITS would be officially extended to 3-year statute of limitations, every discriminated employee would have chance to think about filing a charge and try to find another secure job instead of filing a charge.

3. WHETHER DISCOVERED FALSE AND ABUSIVE STATEMENT ABOUT TERMINATION COULD BE UNDERSTOOD DIFFERENTLY THEN A DIRECT EVIDENCE TO APPLY EQUITABLE TOLLING AND TO PROVE POST-RETALIATION AND BLACKLISTING.

I requested this statement (A15) after numerous interviews without any offer and inability to find even part time job or non-professional one. I could not imagine that every time I filled out application describing my employment, my employer or prospective employer had, AT LEAST!!!, that statements. After I received that dirty statements, I could understand any prospective employer. Nobody wanted to hire person who had scandals or bad job performance and unwillingness to work.

I understood that having that "job references", I could not apply for any job even for a job to clean rest rooms.

How ridiculous I was while applying for any job! How ridiculous I was giving my excellent references letters! They meant nothing. After receiving that statement, I understood ground for discrimination I was subject to. Even knowing me and my skills, management of all three companies where I tried to work were ready to use that information for the purpose they needed: to have fun, to use me and terminate in any moment when they wished and so on.

I consider that statements as cancer that spread to any company who was willing to get information about me. If Xerox allowed to do so, every company felt free to humiliate me supporting Xerox's actions or just doing it on its own. These statements were not just dirty rumors but an official statements from the companies that are much more believable than any of my reference letters. I could only imagine what a dirty statements were given to every prospective employers over the phone.

I think that both 2-nd circuit and district court erred when did not pay enough attention to that false and humiliating statement.

In the context of Title VII, direct evidence includes any statement or written document showing a discriminatory motive on its face. See Miles v. M.N.C. Corp., 750 F.2d 867, 870 (11th Cir.1985) (holding "discriminatory statements and admissions" to be direct evidence).

I believe that a statement from Xerox is not only a proof of post-retaliation and blacklisting. This statement is DIRECT EVIDENCE justifying employer's wrongdoing, employer's abuse of power. *"Direct evidence is evidence which, if believed, proves the fact [of intentional discrimination] without inference or presumption." Brown v. East Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir.1993).*

But the worst scenario for that situation is the situation if I could not get any statement from the company or received another false statement when no reason to be aware of blacklisting.

How could I shut dirty mouth if this mouth belongs to the company everybody trusts or should trust and I can't hear it? What would be recognized as DILIGENT behavior in this situation?

I THINK THAT FALSE DIRTY STATEMENTS FROM OFFICIAL ORGANIZATIONS SHOULD BE CONSIDERED AS A CRIME FROM THE LEGAL POINT OF VIEW, not just willful and deliberate violations of civil rights under Title VII.

4. WHETHER THE SECOND CIRCUIT ERRED WHEN FOUND MY ACTIONS WERE NOT DILIGENT TO APPLY EQUITABLE TOLLING IN MY CASE.

My first point: whether EEOC misleading is not enough proof to extend time for filing charge against Xerox. *Title 29'CFR - Chapter XIV Document Number: 29 CFR* 1614- A *"THE PURPOSE OF EEO COUNSELING*

1 To try to informally resolve the matter at issue-before the formal EEO process has begun. To do this, the counselor must get all the necessary facts, and understand who all the involved players are.

2. To advise aggrieved persons of their rights and responsibilities in the EEO process"

Unfortunately, I could not get help from Buffalo EEOC even after two and a half years. They tried to ignore me again. But I expected it and was a different person with much more experience. This time I have proof I tried DILIGENTLY. I had to start my complain from Washington EEOC office. Even after Washington EEOC reply I had to call them many times asking to force Buffalo EEOC to mail me just "right-to-sue" letter and had to right the letter to the Director of Buffalo EEOC Ms. Cadle (A 14). Washington EEOC had to mail me their response three times until I finally received it. The last time the response was mailed with certified mail. Is this proof of acting DILIGENTLY or the fact I was blacklisted and even my mail was controlled by some sick people?

The second point: EEOC-Buffalo office did not want to investigate this case in 1994-1995 as well as in 1997. EEOC gave their determination without asking Xerox to submit them any information. After my request to mail me copy of the file, I received just documents I mailed to EEOC. There was no documents from Xerox and EEOC office indicated they did not ask Xerox for additional information.

It makes EEOC's action very suspicious. Was it the result of Xerox's blacklisting or just my issues were not so important for EEOC in 1994 as well as in 1997?

I think if EEOC, organization for mediation between employee and employer, refuses to mediate, an extended time limits has to apply. *An "uncounseled plaintiff should not be penalized for the EEOC's mistake of law." Angotti v. Kenyon & Kenyon, 929 F. Supp. 651, 656 (S.D.N.Y. 1996) (quoting Jennings v. Am. Postal Workers Union 672 F.2d 712, 715 (8th Cir. 1982)).*

The third point: whether the method of termination was not destructive enough to understand I had attacker who was ready to act illegally and was fully protected by Xerox. There is no diligent actions exist to stop company that is ready to act unlawfully.

We are unequal. I depend on them, but they do not depend on me! This knowledge drove Ishler to his extreme and unlawful conclusions.

The fourth point : whether endless searching for a job and ability to find three of them when each was terminated with discrimination: first - after six weeks; second - after six days; third - after four months, is not a proof I was trying to avoid problems. Whether all these facts are not evidently enough to prove I was DILIGENT in attempt to avoid further complications and did everything I could to have normal life.

My experience proves the total destruction for employee to choose whether to file charges against powerful employer-discriminator (in case he is acting unlawfully) because of so many existing ways to destroy employee's (individual) life without any risk to be punished for these actions.

5. WHETHER THE DISTRICT COURT ERRED IN FINDING NO FACTS SUPPORTING MY CLAIM IN VIEW OF ALL ASPECTS BROUGHT FOR ATTENTION.

I think that even in the case of filing charge on time, my claim would not have a chance to go to jury. Conclusion I did not state a claim is a disaster. It gives tremendous power to the employer over individual even when facts are indisputable

* Hostile work environment I had no chance to avoid. I had no opportunity to be treated equally or, at least, with respect. All my efforts to find another job inside or outside Xerox were fruitless. I am sure I was blacklisted already but did not know about.
* Sexual harassment and verbal complain about was ignored by Ishler. His reaction makes me very suspicious how sexual harassment was organized and who inspired that woman.
* Written complaint caused uncontrolled anger and retaliation with wrongful termination on the next day after complaint.
* I could not find a job that would give me any security for almost three years. Three terminations with evidences of discrimination made it clear Xerox and Ishler were working too hard on my behalf . (I would name their activity "DILIGENT"). They implemented the very safe and secure way to fight with their former employee.
* False statement about termination proves post-retaliation and blacklisting, and supports my statement of abuse of power.
* Writing letter to Washington EEOC in 1997 proves inability to force Buffalo EEOC to help me or, at least, to get professional advice after termination in 1994 when I needed it desperately.

CONCLUSION

My employment history is an example when employment discrimination against individuals becomes an adventure for employer. Xerox is this kind of employer everybody should be aware of.

For the foregoing reasons I respectfully request this Court to grant this petition for Writ of Certiorari and to reverse the judgement of the 2-nd Circuit Court of Appeals.

Respectfully submitted this 24th day of September, 1999.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the city of New York, on the *twenty-ninth day* of *June* one thousand nine hundred and ninety-nine.

PRESENT: (Filed Jun. 29 1999)

HON. JOSEPH M. McLAUGHLIN,
HON. DENNIS JACOBS,
Circuit Judges,
HON. COLLEEN McMAHOM,*
District Judge.

----------x

VICTORIA TALYANSKY,
Plaintiff-Appellant,

-v.- 98-9389

XEROX CORP., J. M. Ishler, Division Manager,
Defendants-Appellees.

----------x

- Hon. Colleen McMahon of the US District Court for the Southern District of New York, sitting by designation.

APPEARING FOR APPELLANT:
VICTORIA TALYANSKY, pro se
Springfield, Massachusetts

APPEARING FOR APPELLEES:
MARGARET A. CLEMENS, ROCHESTER, NY
(Stanley J. Matusz, Nixon, Hargrave, Devans & Doyle LLP, on the brief)

Appeal from the United States District Court for the Western District of New York (Larimer, J.) .

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff Victoria Talyansky, pro se, appeals from a judgement of the United District Court for the Western District of New York dismissing her complaint against defendants Xerox Corporation and J. M. Ishler, a division manager at Xerox, on the ground that it was time barred.

Talyansky filed her complaint after receiving a "right to sue" letter from the Equal Employment Opportunity Commission, which dismissed the EEOC charge of discrimination as time barred. As to Talyansky's claims of hostile environment and retaliatory discharge, the district court found that the claims were time barred because the alleged discriminatory acts occurred in October, 1994, more than 300 days before the EEOC charge was filed in April 1997. The court found that Talyansky's allegations of continuing retaliation were too vague and generalized to support claim.

A Title VII claimant may file suit in federal court only if she has filed a timely charge with EEOC and obtained a right to sue letter from that agency. See 42 U. S. C. $ 2000e-5(e) and (f). In New York, where the New York State Division of Human Rights addresses claims of employment discrimination, a charge must be filed with EEOC within 300 days of the alleged discrimination. See 42 U. S. C. $ 2000e-5(e) ; Butts v. City of New York, 990 F. 2d 1397, 1401 (2d Cir. 1993).

The time began to run for Talyansky's hostile work environment and retaliatory discharge claims when she was terminated from her job in October 1994. See Chardon v. Fernandez, 454 U. S. 6 , 8 (1981) (300 days runs from date when employee received notice of termination). These claims are time-barred because Talyansky did not file an EEOC charge until April 1997, almost three years after the alleged discriminatory actions. Talyansky is not entitled to waiver, modification, or estoppel of the time limit. See South v. Saab Cars USA, Inc., 28 F. 3d 9, 12 (2d Cir. 1994). The fact that Talyansky did not know why Xerox terminated her until March 1997 does not toll the time limit because Talyansky apparently believed that she was being retaliated against at the time she was fired . Talyansky is also not entitled to equitable tolling merely because she is an immigrant and unskilled in the law. See South, 28 F. 3d at 12 (no equitable tolling where plaintiff, even if pro se, failed to act diligently) (citing Baldwin County Welcome Ctr. V. Brown, 466 U. S. 147, 151 (1984) (per curiam)) .

As to the continuing retaliation claim, Talyansky submitted no evidence that Xerox continues to retaliate against her notwithstanding the fact that she has been unable to secure reemployment. There is no evidence that Xerox has interfered with her ability to get a job or even provided negative references to prospective employers.

For the reasons set forth above, the judgement of the district court is hereby AFFIRMED.

FOR THE COURT,

KAREN GREVE MILTON, Acting Clerk

By:

/s/ Lucille Carr,
Lucille Carr, Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

----------x

VICTORIA TALYANSKY,

Plaintiff,

DECISION AND ORDER
97-CV-6397L

v.

XEROX CORP., J.M. ISHLER, DIVISION MANAGER,

Defendants.

----------x

FILED
U.S. DISTRICT COURT
W. D. of N.Y

SEP 30 1998
AT 9:30 AM
BY /s/Lopgjen
TITLE Admin. Clerk

BACKGROUND

Plaintiff, Victoria Talyansky ("Talyansky"), filed the instant complaint against defendants Xerox Corporation ("Xerox") and J.M. Ishler ("Ishler"), alleging claims under Title VII of the Civil Rights Act, 42 U. S. C. $$2000 et al. ("Title VII") Talyansky alleges that defendants subjected her to a hostile work environment and retaliated against her when she complained of the treatment by terminating her employment and by giving unsatisfactory references to prospective employers.

Pending before me is defendants' motion to dismiss Talyansky's complaint. For the reasons discussed , infra, defendants' motion is granted and Talyansky's complaint is dismissed in its entirety.

FACTS

From 1990 through her termination in October 1994, Talyansky was employed as a contract employee at Xerox through Burns Personnel, Inc., a company that supplies contract workers to Xerox and other businesses. In the middle of 1993, according to Talyansky, when defendant Ishler was appointed as the new division manager, her work environment began "getting more and more hostile".
See Plaintiff's Complaint. Talyansky alleges that she was terminated from her position as a result of her complaints to Ishler regarding the hostile environment.

Talyansky filed a charge of discrimination with Equal Employment Opportunity Commission ("EEOC") on April 17, 1997. The EEOC charge mirrors her complaint before this court, *i.e* hostile work environment caused by sexual harassment, retaliatory discharge, and continued retaliation in the form of negative employment references. The EEOC dismissed the harassment and discharge elements of the charge because the charge was not filed within 300 days of the alleged discriminatory conduct as required by the statute. The EEOC dismissed the retaliation charge because the charge was vague and because it did not include any allegation that Xerox had given her a bad reference within 300 days prior to the charge or that she had even applied for a position within that time.

DISCUSSION

I. Standards on Motion to Dismiss

Talyansky brings this action *pro se*. Generally, *pro se* complaints are held "'to less stringent standards than formal pleadings drafted by lawyers.'" *Ortiz v. Cornetta*, 8667 F. 2d 146, 148 (2d Cir. 1989), quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972). In addition, when considering a defendant's motion to dismiss, a court must accept the plaintiff's allegations as true and resolve competing inferences in her favor. Cruz v. Beto, 405 U.S. 319, 322 (1972).

The burden on the defendant in a motion to dismiss is substantial. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Coney v. Gibson*, 355 U. S. 41, 45-46 (1957). When confronted with motion to dismiss for failure to state a claim, the court's function "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Geisler v. Petrocelli*, 616 F. 2d 636, 639 (2d Cir. 1980). The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support claim." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

"When determining the sufficiency of [a plaintiff's] claim for Rule 12(b)(6) purposes, consideration is limited to the factual allegations in plaintiff['s] ... complaint, which are accepted as true, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiff['s] possession or of which [plaintiff] had knowledge and relied on in bringing suit." Brass v. American Film Technologies, Inc., 987 F. 2d 142 , 150 (2d Cir. 1993).

Recognizing the strong burden imposed upon defendants in a motion to dismiss, I nevertheless find that defendants in this case met that burden.

II. Hostile Work Environment and Retaliatory Discharge Claims

Talyansky's complaint contains very vague claims that she was subjected to a hostile work environment sometime in the middle of 1993. She also alleges that as a result of her complaints to Ishler, the division manager, she was discharged in October 1994. Talyansky did not file any administrative charge relating to these claims until July, 17, 1997, almost three years after the events in question.

Under Title VII, a claimant must file a charge of discrimination with EEOC within 300 days after the alleged discriminatory event. 42 U. S. C. $$ 2000e-5(e). When a plaintiff has not done so, the claim is time-barred. Butts v. City of New York Dept. Of Housing Preservation and Development, 990 F. 2d 1397, 1401 (2d. Cir. 1993) (Title VII); Demers v. Niagara Mohawk Power Corp., No. 94-CV-1277, 1996 WL 293162 *2-*3 (N.D.N.Y May 24, 1996) (ADA).

In the present case, Talyansky did not file her administrative charge until almost three years after allegedly discriminatory conduct, clearly outside of the 300 day filing requirement. Of course, the timely filing of an EEOC charge is not a jurisdictional prerequisite to filing a federal lawsuit but is more akin to a statute of limitations and subject to waiver, estoppel and tolling under appropriate circumstances. *Zipes v. Trans World Airlines, Inc.* U. S. 385, 393 (1982).

In the absence of factors that would warrant tolling or otherwise extending the filing period, however, courts have not been hesitant to dismiss claims that have not been timely filed with the EEOC. *See VanSant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 712-13 (2d Cir. 1996);

South v. Saab Cars USA, Inc., 28 F. 3d 9, 12-13 (2d Cir. 1994); *Sharkey v. Lasmo* (Aul Ltd), 992 F. Supp. 321, 333-34 (S.D.N.Y. 1998) (ADEA case); *Farrell v. State of New York*, 946 F. Supp. 185, 193 (N.D.N.Y. 1996); *Frank v. New York State Elec. & Gas*, 871 F. Supp. 167, 171 (W.D.N.Y. 1994).

In the present case, Talyansky has provided no grounds for waiver, estoppel or tolling of the filing requirement. Thus, Talyansky's hostile work environment and retaliatory discharge claims must be dismissed.

III. Continuing Retaliation Claim

Talyansky also alleged that Xerox has continued to retaliate against her by providing negative references to prospective employers. Talyansky made the same very vague claim in her EEOC charge. The EEOC dismissed the charge, finding that Talyansky provided no evidence that Xerox had given her a bad reference in the 300 days prior to her filing of the charge or that she had even applied for a job within that time.

I find that Talyansky's EEOC charge was woefully inadequate to satisfy the statutory requirement that she file a timely charge with EEOC prior to bringing suit in federal court. As the *Butts* court noted, the exhaustion requirement is an essential element of Title VII's statutory scheme." *Butts*, 990 F.2d at 1401. Its purpose is to "encourage settlement of discrimination disputes through conciliation and voluntary compliance." *Id.; see also Stewart v. United States Immigration and Naturalization Service*, 762 F. 2d 193, 198 (2d Cir. 1985). "Were we to permit such vague, general allegations, quite incapable of inviting a meaningful EEOC response, to define the scope of the EEOC investigation and thereby predicate subsequent claims in the federal lawsuit, such allegations would become routine boilerplate and Title VII's investigatory and mediation goals would be defeated." *Butts*, 990 F.2d at 1403.

Talyansky's EEOC charge that defendants were providing potential employers with negative references in retaliation to her previous complaints of sex discrimination was simply too vague and generalized to allow the EEOC to conduct an investigation and provide meaningful response. Thus, Talyansky's claim that Xerox has continued to retaliate against her by providing negative references to prospective employers must also be dismissed for her failure to timely file an adequate administrative charge with the EEOC.

CONCLUSION

Defendants' motion to dismiss (docket#3) is hereby granted and the complaint is dismissed with prejudice.

IT IS SO ORDERED.

/s/DAVID G. LARIMER
DAVID G. LARIMER
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: Rochester, New York
September 30, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
JUDGMENT IN A CIVIL CASE

VICTORIA TALYANSKY,	*	U.S. DISTRICT
	*	W.D.N.Y. ROCHESTER
Plaintiff(s)	*	
	*	
XEROX CORP., J.M. ISHLER,	*	FILED:
DIVISION MANAGER,	*	October, 2 10:33 AM
Defendant(s)	*	
	*	CASE NUMBER:
	*	97-CV-6397L

0 Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the complaint is dismissed with prejudice.

October 2, 1998	Rodney C. Early
Date	Clerk
ATTEST: A TRUE COPY	/s/ Bryan J. Blough
U.S. DISTRICT COURT, WDNY	(By) BRYAN J.
BLOUGH	
RODNEY C. EARLY, CLERK	Deputy Clerk
By /s/ Bryan J. Blough	
Deputy Clerk	Original Filed 9-30-98

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Ms. Victoria Talyansky
466 Deborah Drive
Utica, New York 13502

Dear Ms. Talyansky:
This is in response to your letter dated April 14, 1997, concerning alleged discrimination practices.
The Equal Employment Opportunity Commission (EEOC) enforces various laws which prohibit employment discrimination based on race, color, religion, sex, national origin, age and disability. Based upon our review of your letter it appears that the alleged discriminatory acts detailed in your letter are not jurisdictional with EEOC because they do not meet the time frames proscribed by law. To preserve the ability of the EEOC to act on behalf of a charging party and to protect his or her right to file a private lawsuit, a charge must be filed with the EEOC within 180 or 300 days of the alleged discriminatory act, depending on the geographical location. In the State of New York, a charge must be filed with the EEOC within 180 or 300 days of the alleged discriminatory act. Since your termination from Xerox occurred more than 300 days ago, a timely charge concerning your discharge cannot be filed with the EEOC.

If you have further questions or you need other assistance in a matter which may be covered by the laws enforced by the EEOC, you may contact your local EEOC office at the following address:

U.S. Equal Employment Opportunity Commission
Buffalo Local Office
6 Fountain Plaza, Suite 350
Buffalo, New York 14203 No. (716)551-4441

We hope this information is helpful to you.

Sincerely,

/s/ Godfrey D. Dudley, Director
Field Management Programs-East

Dated: May - 6, 1998

Victoria Talyansky
466 Deborah Drive
Utica, NY 13502

(315) 724-7590

EEOC, Buffalo
received: July, 3 1997

Ms. Cadle
EEOC, NY District
Buffalo Local Office
6 Fountain Plaza
Buffalo, NY 14202-2211

Dear Ms. Cadle:

I ask you to issue a Notice-of-Right-to-Sue letter to me.
I think I have all paper you ask me for.
Director FMP Mr. Dudley indicated that this letter has to be sent from your office.

I would like to mention you that I don't have enough time to file this case with US District Court because in three months it will be 3 years as that accident occurred.
I would like to ask you to issue the Letter as soon as possible.

I count on your support in this endless and humiliating situation.
I don't think that many people in America were in this situation.

Sincerely,
/s/ Victoria Talyansky
Victoria Talyansky

07/01/97

burns personnel

Providing flexible work force staffing in Word-processing * Office* Accounting* Technical * Industrial * Testing & Training * Direct Placement

February 11, 1997

Victoria Talyansky
466 Deborah Drive
Utica, New York, 13502

Dear Ms. Talyansky:

The reason for terminations are as follows:

Xerox Corp. - Conflict with co-workers.

Mercury Print - Poor job match. Victoria made mistakes and was reluctant to work overtime and work on the "B" shift.

Victoria, please, feel free to use my name as a work reference.

Very truly,
/s/ Jackie Tedesco
President, Jackie Tedesco

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MEMO

From Victoria Talyansky,
key operator

To: Mike Ishler,
FI Manager.

September 26, I have been brutally assaulted by Faith Kune. In her unprovoked insulting attack, she used expressions: "you are bitch", "Mrs. Bitch", "what a hell" and another expressions that I would not like to repeat.

This shameless, criminal and absolutely unexpected attack was not the first one for the time I am working with Faith Kune in the same bay.
But her behavior is getting more offensive from time to time.

I did not let you know about her previous scandals because I was sure that test engineers reported you about it.

Now I see that situation is getting from bad to worse, so I can even suspect some support of her criminal actions against me.

Mr. Ishler, I do not intend to forget or forgive this brutal attack especially because I do not know what will be the next step or who will be the next one, if she or he feels supervisors tolerance.
The next step can be either fistfight (as it was in your LAB in December, 93) or something worse.
Please, consider this memo as my first step in legal defense.

Victoria Talyansky. Received from Victoria on 9/27/94
/s/ Victoria Talyansky /s/ J. Mike Ishler
9/26/94

bpi
burns personnel, inc.
Word-processing - Office - Accounting - Technical -
Industrial - Testing & Training - Direct Placement

October 3, 1994

To Whom It May Concern:

Ms. Victoria Talyansky has been employed by Burns Personnel, Inc., since December 17, 1990. She has been assigned to Xerox Corporation on a contract basis as a Software Tester.

Victoria has received excellent evaluations from her supervisors. She has proven to be a reliable and conscientious worker. She works well independently, and has shown an ability and willingness to acquire new skills.

Victoria is a quality employee , and I am sure she would be an asset to any future employer. I highly recommend her for any position she applies for.

Feel free to call me at 716/546-6600 if I can provide any further information.

Sincerely,

s: Teresa Hamilton-Schulz
Placement Manager
Burns Personnel, Inc.

FROM: Jean-Claude PIERRE
Webster, September 2, 1994
Xerox Corporation
Extended Storage Server Program Manager

TO: WHOM IT MAY CONCERN

SUBJECT: Recommendation Letter

This letter is written on behalf of Victoria Talyanski. She has been working for Xerox Corporation in the DocuTech Production Publisher program as a contract employee since December 1990. She started as a system Key-Operator I. My former manager and I quickly agreed that Victoria Talyanski had fully demonstrated that she had the abilities to perform in a higher capacity. She showed an overall excellent understanding of testing practices and was promoted to System Key-Operator II.

Victoria had proved herself to consistently be one of our top performing system key operators at the time in the Full Integration Lab. She had mastered both the basic and more advanced technical functions of her position, in addition to understanding on her own the larger functional issues of this complex machine. She showed exceptional initiative in completing her assignments with minimal supervision, and was given several assignments to teach herself complex details of the system, and then test them. We depended on Victoria, as a System Key-Operator II, to perform all "performance" tests required for the Integrated DocuTech, including the DocuTech, the Extended Storage Server and SBM.

Victoria had a chance to train her peers in the performance testing art, a task she completed with the great success.

Victoria Talyanski can be an asset anywhere and I could not be happier to recommend her to be a member of your team.

Sincerely,

Jean-Claude Pierre

/s/ Jean-Claude Pierre

Rex B. Murphy
Xerox Corporation
800 Phillips Road 129/38A
Webster, NY 14580
(716) 422-9920

April 29, 1994

To Whom It May Concern:

As a software development engineer with Xerox, I have had the pleasure of working closely with
Victoria Talyansky for the past two years. In her role as a DocuTech operator in our development
testing center, Victoria has demonstrated an uncanny ability to uncover subtle software problems, bring
them to the attention of the responsible engineer and follow them through to resolution.
Victoria is hard working, conscientious, and fun to be around. From my experiences with Victoria,
I have the feeling that she can master any task she puts in her mind to. Her mastery of the English language
is a case in point. I am happy to recommend Victoria for any position she feels qualified to apply for.
If you have any question, please, feel free to contact me.

Sincerely,
s: Rex B. Murphy

Rex B. Murphy.

No. 99-529

IN THE

Supreme Court of the United States

VICTORIA TALYANSKY,

Petitioner,

v.

XEROX and J.M. ISHLER, as Division Manager,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The petition accurately lists the parties to the proceeding.

Respondent Xerox has no parent companies.

There are no publicly owned companies who own more than 10% of Respondent Xerox' outstanding stock, however, State Street Bank & Trust Co. has a beneficial ownership of Xerox shares in excess of 10% in its fiduciary capacity as Xerox plan administrator.

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STATUTE INVOLVED

42 U.S.C. § 2000e-5(e):

Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

> (1) A charge under this section shall be filed within one hundred and eight days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

STATEMENT OF THE CASE

This petition seeks this Court's review of the lower courts' decisions to dismiss the Complaint of petitioner Victoria Talyansky ("petitioner") and grant judgment in favor of respondents, Xerox Corporation ("Xerox") and J.M. Ishler, Division Manager ("Ishler"). The lower courts held that it was evident from the face of the complaint and the documents attached to it that petitioner failed to satisfy the jurisdictional prerequisites for suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, ("Title VII"). As detailed below, there is no cause for review of the lower courts' decisions.

Petitioner commenced this action by filing a Complaint in the United States District Court for the Western District of New York on or about September 8, 1997. (AA 1-2,[1] Complaint). As alleged in her Complaint, petitioner was retained as a contract worker by Xerox from 1990 until her discharge in October 1994. (AA 1-2, Complaint ¶¶ 4-6). Although the allegations in the Complaint are vague and confusing, petitioner essentially alleged that she was subject to some sort of hostile environment in 1993 while she worked at Xerox. (AA 6, Complaint ¶ 19). She further alleged that she was discharged in 1994 in retaliation for complaining about this environment. (*Id.*). Finally, petitioner claimed that she believed Xerox gave out poor references about her to potential employers as a form of post-employment retaliation. (*Id.*). According to the Complaint, these subsequent acts of discrimination allegedly occurred on September 28, 1994. (AA 4, Complaint ¶ 6).

1. References to the Appendix to the Second Circuit are referred to as ("AA [page number]"). References to Petitioner's Appendix to the petition are ("PA [page number]").

Respondents, Xerox and J.M. Ishler, moved to dismiss the Complaint in its entirety, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that petitioner failed to satisfy the jurisdictional prerequisites for suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (AA 12-30). Respondents also moved to dismiss the Complaint against J.M. Ishler on the grounds that Title VII does not impose liability on individual supervisors because individuals are not "employers" within the meaning of Title VII. (*Id.*).

In a written Decision and Order, dated September 30, 1998, the District Court dismissed the Complaint in its entirety. (AA 50-55). Giving petitioner every reasonable benefit as a *pro se* plaintiff and accepting the allegations in the Complaint as true, the District Court found that petitioner "did not file her administrative charge until almost three years after the allegedly discriminatory conduct, clearly outside the three hundred day requirement." *Id.* The District Court further found that petitioner provided no grounds for waiver, estoppel or tolling of the filing requirement. (*Id.*).

With respect to the allegation that Xerox continued to retaliate against her by giving out negative job references, the District Court noted that the EEOC had dismissed this charge because petitioner had provided no evidence that Xerox had given her a bad reference in the 300 days prior to the filing of her charge or that petitioner had even applied for a job within that time. (PA 9). Under these circumstances, the District Court found that petitioner's "EEOC charge was woefully inadequate to satisfy the requirement that she file a timely charge with the EEOC prior to bringing suit in federal court." (PA 9).[2]

2. The District Court did not reach the issue of whether liability could be imposed against J.M. Ishler, individually, under Title VII.

Petitioner appealed the judgment to the United States Court of Appeals for the Second Circuit on October 14, 1998. After briefing and hearing oral argument, the Circuit affirmed the District Court's decision in a summary order, dated June 29, 1999. (PA 1-4).

The Circuit Court correctly held that the time began to run for petitioner's hostile work environment and retaliatory discharge claims when she was terminated from her job in October 1994, and that her claims were time-barred because petitioner did not file an EEOC charge until April 1997 — almost three years after the alleged discriminatory actions. (PA 3). The Circuit Court also agreed that petitioner was not entitled to waiver, modification or estoppel of the 300 day time limit. (PA 3). The Circuit Court noted that because petitioner believed she was being retaliated against at the time she was being fired, the mere fact that petitioner did not know the reason for why Xerox terminated her until March 1997 did not toll the limitations period. (PA 3). The Circuit Court further held that petitioner was not entitled to equitable tolling on the grounds that she is an immigrant and unskilled in the law. (*Id.*).

Finally, the Court affirmed the dismissal of petitioner's continuing retaliation claim on the grounds that petitioner submitted no evidence that Xerox has interfered with her ability to get a job or that it even provided negative references to prospective employers. (PA 3).

Petitioner served her Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit on September 24, 1999.

STATEMENT OF FACTS

On July 21, 1997, petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (AA 9). In her charge, petitioner claimed that she was retained as a contract worker by Xerox from 1990 until her discharge in October 1994. (AA 6, Complaint ¶¶ 4-6). Although vague and confusing, the charge essentially alleged that she was subject to some sort of hostile environment in 1993 and that she was discharged in 1994 in retaliation for complaining about this environment. (AA 6, Complaint ¶ 19). Petitioner also claimed that she believed Xerox gave out poor references about her to potential employers as a form of post-employment retaliation. (*Id.*).

On July 31, 1997, the EEOC issued a Dismissal and Notice of Right to Sue letter and advised petitioner that her claims were dismissed because her "charge was not filed within the time required by law." (AA 8, 10-11, Dismissal and Notice of Rights and July 31, 1997 EEOC letter to Talyansky). The EEOC determined that the alleged harassment and discharge that petitioner complained of "clearly happened more than 300 days" before any charge was filed with the EEOC. (AA 10, July 31, 1997 EEOC letter). The EEOC further determined that her allegations of Xerox giving out poor job references was very vague, unsupported by any evidence that such conduct occurred within 300 days prior to the charge, and unsupported by evidence that petitioner had even applied for a job within that period of time. (*Id.*).

Following receipt of the Notice and the EEOC letter, petitioner commenced this action by filing a Complaint in the United States District Court for the Western District of

New York on or about September 8, 1997. (AA 1-2). The allegations in the Complaint essentially mirrored the allegations in petitioner's EEOC charge. (*Id.*)

REASONS FOR DENYING THE WRIT

The lower courts' dismissal of petitioner's Complaint was based upon well settled law, and there is no cause for this Court's review of this matter. Petitioner's complaint was properly dismissed because it was evident from the face of the Complaint and the documents petitioner attached to it that she could prove no set of facts that would entitle her to relief under Title VII of the Civil Rights Act. Writ of Certiorari should be denied because the decisions below correctly applied well-settled law, no conflict among the circuits is alleged, and the courts below did not depart from the accepted course of judicial proceedings in rendering their decisions.

I.

THE COURTS BELOW APPLIED THE PROPER STANDARD IN GRANTING RESPONDENTS' MOTION TO DISMISS

It is well settled law that Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes a trial court to dismiss an action where, as in this case, it appears from the face of the Complaint and from any documents attached to it that the plaintiff could prove no set of facts in support of her claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Still v. DeBuono*, 101 F.3d 888, 890 (2d Cir. 1996); *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991), *cert. denied*, 503 U.S. 960 (1992). "The issue is

not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Scheuer*, 416 U.S. at 236.

In determining the sufficiency of petitioner's Complaint, the courts below properly limited their consideration to the allegations in the Complaint, which they accepted as true, as well as to the documents petitioner attached to the Complaint or incorporated into it by reference, and documents in plaintiff's possession or documents which plaintiff had knowledge of and relied on in bringing suit. *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). The courts below recognized that there was a strong burden on respondents on a motion to dismiss, but nevertheless found that the respondents had met their burden. As discussed below, this finding is amply supported and fully justified by the allegations in petitioner's Complaint and the documents she attached to it.

II.

PETITIONER'S CLAIMS ARE CONCEDEDLY TIME-BARRED

It is well-settled that under Title VII the statute of limitations for filing a charge of discrimination with the EEOC is 300 days in states that have an agency with the authority to address charges of discriminatory employment practices. 42 U.S.C. § 2000e-5(e). Since New York has such an agency, a plaintiff must file a charge of discrimination with the EEOC within 300 days of the alleged unlawful occurrence. *Butts v. New York Dep't of Hous. Preservation & Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993). If this requirement is not met, any claim filed in federal court is

time-barred. *Butts v. City of New York Dep't. of Hous. Preservation and Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993). Petitioner does not claim, nor is there in fact, any dispute among the Circuits in this regard.

In her Complaint, petitioner sought relief for allegedly discriminatory acts that occurred during a period of time between 1993 and October 1994, (AA 4, 6, Complaint ¶¶ 6, 19), but waited nearly three years after these allegedly discriminatory events before filing a charge with the EEOC. (AA 9). Accordingly, the lower courts correctly found that petitioner did not timely file her administrative charge, and dismissed her claims. (AA 53-54, PA 2-3). Under well-established law, petitioner's time period within which to commence suit was measured from the date of her discharge in 1994. *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (300 days runs from date when employee received notice of termination); *Morse v. University of Vermont*, 973 F.2d 122, 125 (2d Cir. 1992) (*quoting O'Malley v. GTE Service Corp.*, 758 F.2d 818, 820 (2d Cir. 1985) ("[t]imeliness of a discrimination claim is measured from the date the claimant receives notice of the allegedly discriminatory decision")).

The lower courts also correctly found that petitioner's continuing retaliation claim was woefully inadequate. (AA 54-55). Neither the Complaint itself nor petitioner's attached EEOC charge alleged any instances where Xerox gave her a poor reference within 300 days of the filing of the charge. (AA 6, 9, Complaint and EEOC Charge). In fact, and instead of pointing out any alleged instances where Xerox provided a poor reference, petitioner attached to her Complaint a letter from the EEOC which stated that petitioner had *no* evidence suggesting that Xerox had given her a bad reference in the 300 days prior to the filing of her charge

and, indeed, no evidence that she had even applied for a job 300 days prior to the charge.[3] (AA 10-11, July 31, 1997 EEOC letter to Talyansky). In the same attached letter, the EEOC further noted that a letter from a temporary agency which petitioner relied upon to support her claim, did not in any way show that Xerox had ever told any prospective employer that petitioner was discharged because she could not get along with co-workers. (*Id.*).

Since the EEOC's letter was attached to her Complaint, it was properly considered by the courts below as part of the pleadings. *International Audiotext Network, Inc. v. American Tel. and Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (a "complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference").

The lowers courts' decisions with respect to the timeliness and sufficiency of petitioner's allegations are consistent with the established law of this Court and do not conflict with other courts of appeal or depart from the usual course of judicial proceedings.

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3. Based on her submission to this Court, it now appears that petitioner's allegations concern a position that she held with Mercury Print Millennium and Syracuse Language Systems in 1994 and 1995. (*See* Petitioner's Brief pp. 6-7). To the extent that petitioner sought relief for unspecified discriminatory acts that occurred in 1994 and 1995, those claims are also time-barred.

III.

PETITIONER'S CLAIMS ARE NOT GOVERNED BY A THREE-YEAR STATUTE OF LIMITATIONS PERIOD

Petitioner contends that a three year statute of limitations should govern her claim because she has evidence of conduct that she contends is "deliberate discrimination." (Petitioner's Brief, p. 15). As discussed above, this case is not governed by a three-year limitations period. Moreover, none of the cases cited by petitioner supports this proposition. Petitioner, for example, cites *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (willful violations of the Fair Labor Standards Act) and *Cash v. Jefferson Assocs., Inc.*, 978 F.2d 217 (5th Cir. 1992) (willful violations of the ADEA). Those case are inopposite because they are outside the context of Title VII and involve completely different statutory schemes. Petitioner's reliance on *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), is also misplaced. *Robinson* holds that a former employee can sue an employer for post-employment discriminatory actions under Title VII, but it does not obviate the need to file a charge of discrimination with the EEOC within three hundred days of the allegedly discriminatory conduct. Finally, *Walters v. Metropolitan Educ. Enterprises, Inc.*, 519 U.S. 202 (1997) and *Ross v. St. Augustine's College*, 103 F.3d 338 (4th Cir. 1996), do not even address the issue, let alone suggest that Title VII provides for a three-year statute of limitations period.

Although petitioner requests that the "time limits [] be officially extended to a 3-year statute of limitations," this is not the appropriate forum to make such a request. That request should instead be brought to the attention of Congress.

IV.

THERE ARE NO GROUNDS FOR EQUITABLE TOLLING

The lower courts properly concluded that petitioner provided no grounds for waiver, estoppel or tolling of the 300-day limitations period. (AA 54, PA 3). In opposing the motion before the district court, petitioner contended that she did not seek any legal protection both because she was not experienced and because "she thought that she would get another job pretty soon." (AA 32, Appellant's Responding Papers in Support of Charge, p. 2).

As the courts below correctly found, petitioner's alleged unfamiliarity with statutory requirements and legal and administrative procedures simply do not justify the application of equitable principles to forgive "strict adherence to procedural requirements specified" by Congress in Title VII. *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). The lower courts correctly held that equitable tolling was not warranted merely because petitioner is an immigrant and unskilled in the law. "Procedural requirements established by Congress for gainful access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984).

Petitioner also contended that she had placed a telephone call to the Buffalo office of the EEOC a few days after she was fired but did not get any help. (AA 32, Appellant's Responding papers in Support of Charge, p. 2).

Placing a telephone call to the EEOC did not satisfy petitioner's obligation to file a timely charge of discrimination nor does it constitute a basis for equitable tolling. To constitute a valid charge under Title VII, a charge must be in writing and under oath. 42 U.S.C. § 2000e-5(b). A mere telephone call does not suffice nor does it warrant tolling. *Conaway v. Control Data Corporation*, 955 F.2d 358, 363 (5th Cir. 1992), *cert. denied*, 506 U.S. 864 (1992).

On appeal, petitioner for the first time alleged that she also had trouble contacting the EEOC by phone in 1997 and could not receive mail from the EEOC because someone was "controlling" her mail. (Appellants Brief p. 11). Since this claim was not presented in the district court and was based upon allegations outside the record on appeal, it was not properly considered by the Circuit Court on review, *Hoar v. Sara Lee Corp.*, 900 F.2d 522 (2d Cir. 1990), nor is it properly before this Court. *See Yee v. Escondido*, 503 U.S. 519, 533 (1992) (this Court does not consider issues not raised in court below). In any event, equitable tolling on the basis of alleged events occurring in 1997 would not extend petitioner's time to file a timely charge based on discriminatory acts that occurred during 1993 and 1994.

Once again, the courts below correctly applied well-settled law. No conflict among the circuits is alleged, and the courts below did not depart from the usual course of judicial proceedings in rendering its conclusion.

CONCLUSION

For the reasons discussed above, respondents, Xerox Corporation and J.M. Ishler, respectfully request that petitioner's request for Certiorari be denied.

Respectfully submitted,

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No 99-529

In The
Supreme Court of the United States

Victoria Talyansky,
Petitioner,

v.

Xerox and J. M. Ishler as Division Manager,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITIONER'S REPLY BRIEF

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In my reply to Respondents' Brief in Opposition I would like to comment the Respondents' statements that support my claim.

DEFENDANTS AVOIDED AND IGNORED FACTS:

I can't believe the defendants don't know that due to Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)[1] they have to follow some order of admitting or denying the facts I presented in my complaint, not IGNORING them.

1. I did not find any explanation in respondents' brief why I wasn't given any opportunity to move to another department or even to another building in Ishler's division. So many co-workers had this choice!!! (Hostile Work Environment).
2. I did not find any explanation why my verbal complaint about sexual harassment was ignored by Ishler and even supported by him. I did not find any indication if respondents' ever "noticed" this claim. Sexual harassment was not mentioned at all. (Sexual Harassment claim).
3. I did not find any explanation why Ishler discharged me after written complaint about sexual harassment. I have to point out it was not complaint about "*some sort of hostile environment" as indicated in Defendants' brief*, it was a complaint about SEXUAL HARASSMENT (A 16) (Wrongful Discharge claim)

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[1] *In Texas Dept. of Community Affairs v. Burdine*:
"When the plaintiff in a Title VII case has proved a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions.
In McDonnell Douglas Corp. v. Green: Supreme Court set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment

4. I did not find any explanation why Xerox gave false statement to the agency about discharge.(A 15).
   I NEVER HAD ANY CONFLICTS WITH ANYBODY IN THE DEPARTMENT!!!

-The fact I was sexually harassed has nothing to do with "*conflict with co-workers*".

-What facts does this statement prove besides *retaliation and blacklisting?*

Finally, I could not find any remarks defendants NEVER gave this awful statement or any other retaliatory statements to my next employers or potential employers. What statements did they give to everybody interesting to hire me? (Post-retaliation and blacklisting claim).

EEOC AND HELP:

DIRECT EVIDENCES I HAD NO HELP FROM EEOC:

Every respondents' reply contains EEOC remark I did not bring any proof of retaliation in last 300 days before filing the charge with EEOC.

As I mentioned in my claim, I was unable to get any help from EEOC-Buffalo office. I understand Xerox's disappointment I had facts for terminations and endless searching for a job only for the first 685 days after discharge. It is not enough for my former employer!!!

1. I had to write letter to Washington EEOC to get any help. (A 12: Response Letter from 5/6/97);
2. The letter-request to Director of EEOC, Buffalo Office from 7/1/97 to issue "Right-To-Sue" letter: (A 14);
3. This EEOC office never requested any information from Xerox. They indicated they had no need in additional information to make a conclusion.

DIRECT EVIDENCE OF WRONGFUL DISCHARGE AND RETALIATION:

I understand the defendants point: not to apply tolling, or discovery, or willfulness after discovering the document (A 15) that proves wrongful discharge, retaliation and blacklisting. It occurred *850* days from the date of termination. It did not happened in magic 300 days limits. I was not too "diligent" to "investigate" Xerox, Burns Personnel, Mercury Print, Millennium Computer Group, Syracuse Language System and many more companies I applied to while was looking for a job. THE RESPONSE IS : I HAVE NO POWER AND ABILITY.

Defendants do not consider this statement as crucial proof of their discrimination against me as well as facts of terminations-discharges from three other jobs I was able to find for the period from October, 1 1994 (day of termination from Xerox) until September, 1996.
I did not find any remark Xerox HAD business relations with that companies I tried to work for and was DISCHARGED from.

I understand that ignoring or twisting the facts is much easier way to avoid the truthful response to any of my claims.
But I am sure I have the right (constitutional!) to find out the truth and to stop activity of humiliation!!!

WHAT IS VAGUE AND CONFUSING STATEMENTS:

In STATEMENT OF THE CASE on page 2 the brief contains:

*"Although the allegations in the Complaint are **vague and confusing**, petitioner essentially alleged she was subject to **some sort of hostile environment** in 1993 while she worked at Xerox."*

The defendant did not explain what facts they consider as *a vague or confusing* in my complaint or what facts they consider as "*some sort of hostile environment.*"

- Do they consider the fact as vague or confusing: I was one of the best employee in the Lab and should have all rights every person in the Lab had?
- Do they consider the fact as *vague or confusing*: after Ishler's appointment as division manager, I could not work effectively and was begging Ishler to transfer me to any other department. I wasn't allowed to do this even when other managers asked for and many co-workers had this "privilege"?

-Do they consider the fact as *vague or confusing*: I was sexually harassed by co-worker and my verbal complain had a reversed effect. But real fun occurred after written complain: I was discharged by Ishler on the next day of complaint. What type of allegation this fact is for defendants': *confusing or vague*?

- Do they consider the fact as *vague or confusing*: I was unable to find another job after Xerox's termination?

Is it not enough convincing for Xerox three contracts I had were terminated each with employment discrimination? What more impressive proof does this company need? How many companies did they need to put into trouble during magic 300 days after discharge or before filing an EEOC complain to accept the fact they retaliated against me as crazy!?

-Do they consider *the false statement* they gave to the agency as *vague or confusing*?

What facts would **not** be considered as ***vague and confusing?***

SUPERVISOR LIABILITY

Statement on page 3: *"Respondents also moved to dismiss the Complaint against J. M. Ishler on the grounds that Title VII does not impose liability on individuals are not "employers" within the meaning of TitleVII."*

I am sure it is right statements if supervisor has no power to hire or to discharge employee.

An opposite situation happened to me:

I was discharge by Ishler as a representor of employer with full power and responsibilities.

Xerox gave *enormous power* to its managers not just to discharge an individual, but to block him/her from obtaining the right to find another job. It looks destructive from the point of view of any reasonable person.

TIME-BARRED ISSUE

300 days to file charge with EEOC should work only if EEOC is willing to help individual. I would like to repeat my statement because I think defendants doesn't want to hear it:

I would never to file any claim if I had a choice.

My experience to find another job was unsuccessful.

I had to file the case in the court. I tried to avoid this destructive experience to file a case in my attempt to find out the truth and to stop continuing discrimination.

Unfortunately, I did not succeed in my attempts to have a fair trial.

WHAT EVIDENCES WOULD SATISFY DEFENDANTS?

PAGE 4: *"petitioner submitted no **evidences** that Xerox has interfered with her ability to get a job or that it even provided negative references to prospective employers"*
I thought that filing a brief in opposition to Supreme Court will force defendants, at least, to explain their false statement to the agency, the real reason for discharge or any reason for discharge.
I expected defendants to explain relations with Mercury Print, Millennium and Syracuse Language Systems or at least, statement they had no relations with these companies.
I expected defendants to explain what statements they gave to these and other companies.
In VEPRINSKY, v. FLUOR DANIEL, (95-2197, 7-th Cir) Appeal Court stated: "we hold that post-termination acts of retaliation that adversely affect the plaintiff's employment opportunities or are otherwise related to employment are cognizable under Title VII...
The ability to "blacklist" a former employee, and thus foreclose future employment possibilities, is but one example of an employer's power to punish a former employee..".

This conclusion meets my statement why retaliation in my case has to be labeled an ABUSE OF POWER.

I can understand employer's willing to get rid of employee, but I don't understand and never will understand *employer's ability* to blacklist future employment (actually, life) as long as they wish to do so using magic 300 days as supportive argument against employee.

CONCLUSION

I, Victoria Talyansky, pro se, respectfully request this Court consider granting the petition supported by this Reply Brief and allow a more in depth consideration of the arguments:

1. To stop employment discrimination against individuals in its easiest way to perform just because his/her manager is willing to do so.
2. To stop blacklisting as destructive and frustrating phenomenon in employment discrimination.

Respectfully submitted this 10th day of November, 1999.

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